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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 1225

APPROVED DEHYDRATING CO., INC.,
*Petitioner,*

*against*

GOLDEN EAGLE FARM PRODUCTS, INC.,
*Respondent.*

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MAURICE RUBINGER,
*Attorney for Respondent.*

# INDEX


| | PAGE |
|---|---|
| Statement | 1 |
| Petitioner's Specifications of Questions Presented Are Without Importance or Substance | 2 |
| The Facts | 2 |
| The Petitioner Fails to Advance Any Tenable Premise to Support Its Application for the Issuance of a Writ | 3 |
| Conclusions | 6 |

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### Statement

The petition is one for a writ of certiorari to review the judgment of affirmance of the United States Circuit Court of Appeals for the Second Circuit.

The opinion of the Circuit Court (R. 343-346) is reported in 147 F. (2nd) 359.

Petitioner claims jurisdiction under Section 240(a) of the Judicial Code, as amended (Section 347(a), Title 28, U. S. C.).

The petitioner has served no brief in support of the petition.

## Petitioner's Specifications of Questions Presented Are Without Importance or Substance

Petitioner, at page 2 of the moving papers, asserts that five questions are presented for consideration.

It is respectfully submitted that not only are the questions without importance or meriting consideration by this Court, but are fallacious, contrary to the facts and directly opposed to the findings of the jury and the determinations of the Courts below.

## The Facts

The action is one to recover the sum of $5,700, the purchase price of liquid eggs sold and delivered by respondent to petitioner.

The respondent is a corporation engaged in the sale of eggs, both in liquid form and in the shell, under the supervision of its President, Mr. Charles Lazar, who has had 42 years of experience in the egg business (R. 34).

The petitioner entered into the business of dehydration of eggs in or about the month of March, 1942. At that time, Mr. Harry Shaw, one of its officers and directors, approached Mr. Lazar and inquired as to the cost of liquid eggs. A price of 24¢ per pound was quoted and after some negotiation, a price of 23¾¢ was agreed upon (R. 16). Mr. Shaw first requested that small deliveries be made for sampling, testing and experimenting. The sample deliveries were made, petitioner's chemist made tests and Mr. Shaw pronounced the results to be satisfactory (R. 118). Thereafter and from March until May 5th, 1942, respondent made substantial deliveries of liquid eggs, for which payment was made.

On May 7th, a shipment of liquid eggs was made, the selling price being $1,140; on May 8th, there was a like

shipment in the sum of $1,140; and on May 12th and 13th, two separate shipments were made, the selling price in each instance being $1,710. The total selling price of these four shipments aggregated $5,700 for which sum, payment was demanded and when refused, the present action was instituted (R. 2, 3).

The petitioner resisted payment, asserting a breach of warranty as to the quality of the eggs sold, and a counterclaim for damages (R. 6-10). The issue was sharply contested at trial and was determined by the jury in respondent's favor.

## The Petitioner Fails to Advance Any Tenable Premise to Support Its Application for the Issuance of a Writ

The petition at pages 8 to 11 asserts three reasons for consideration by this Court. We shall briefly discuss each and show its inadequacy.

### I

Petitioner mistakenly asserts the absence of a conflict of testimony as to the responsibility for the claimed adulteration of the eggs purchased.

At trial, the testimony of petitioner's and respondent's witnesses was directly contradictory as to every material detail of the controversy and squarely raised the issue of respondent's performance under the contract, including, of course, the question of placing the responsibility for any asserted adulteration of the eggs which were the subject of sale (R. 32, 40, 43, 44, 115, 126, 216, 227, 230, 235, 241, 261, 268, 272).

Upon this subject the opinion of the Circuit Court reads as follows:

> "Appellee contends that, as on the issue of whether the eggs had been adulterated before receipt by the defendant, there was solely the uncontradicted testimony of its witnesses, we must apply the rule that, in such circumstances, there is no question which may properly be submitted to the jury. We need not discuss that rule and its many exceptions. (Cases cited.) For here there is ample testimony which, at least (fol. 346) in an indirect manner, contradicts what defendant's witnesses said. It was for the jury to determine whether the assertions of the defendant's witnesses that the sugar was added before the defendant received the eggs, or the plaintiff's witnesses that the sugar could not have been added before the defendant processed them, was true" (R. 344-345).

Clearly the issue was one for the jury.

## II

The subjects of due performance by the respondent as well as petitioner's claim of breach of warranty were sharply litigated at trial, the Trial Court defining the issue as follows:

> "The Court: Now, the question is what caused that fat content to be below the standard. If the defendant after it received the eggs caused them to be below the standard, why then, of course, that is the end of that counterclaim as well as the defense. If, on the other hand, as the defendant claims, the dehydrating process had sugar in them and that caused the fat content to be below the standard, then of course, the defendant is within its counterclaim; so that the jury will have to decide who caused the fat content to be below the standard, if it was done by anybody" (R. 84).

Thereafter, the Court charged the jury fully on the subject (R. 305, 316). There was no exception to the charge or requests to charge (R. 316).

The law was properly applied by the Trial Court, acquiesced in by petitioner's counsel, factually determined by the jury, all of which was unanimously approved by the Circuit Court of Appeals.

## III

Finally, respondent raises the question of the admission of certain evidence by the Trial Court.

The propriety of the admission of the evidence complained of is fully disposed of in the opinion of the Circuit Court, which on that subject reads as follows:

> "There was no error in admitting the chart showing the general layout of a spray drying plant. The chart was used solely for the purpose of explaining the evidence, and the defendant introduced evidence showing that the plant in the diagram differed from its own, primarily in that the defendant used a horizontal spray and the diagram indicated a vertical spray. The admission of the diagram was clearly within the discretion of the court. And the following statement by the court cleared up any ambiguity as to its use:
>
> > 'The Court: It is understood that this diagram in no way indicates the plant, dehydration plant of the defendant. * * * But it does indicate the general principles for the benefit of the jury.'
>
> "Nor was there error in permitting the demonstration indicating that nulomoline changed the color of the liquid eggs. It was made clear that the plaintiff was not attempting to prove that nulomoline was the sugar product used to adulterate the eggs, but was merely using the demonstration to show that a sugar product would change the color. This too was a matter within the trial court's discretion" (R. 345-346).

## CONCLUSION

**The petition for a writ of certiorari should be dismissed, with costs.**

Respectfully submitted,

MAURICE RUBINGER,
*Attorney for Respondent.*